SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 111

JACKSONVILLE GAS CORPORATION, A CORPORATION ORGANIZED AND EXISTING UNDER THE LAWS OF THE STATE OF FLORIDA,

Petitioner,

vs.

FLORIDA RAILROAD AND PUBLIC UTILITIES COMMISSION,

Respondent

REPLY BRIEF OF PETITIONER

Respondent has made two points in its brief in opposition to certiorari herein:

1) That there must be an end to rate fixing proceeding and that the respondent, Florida Railroad and Public Utilities Commission had discretionary authority to grant a rehearing or decline to reopen the case for a rehearing (pp. 5-7); and

2) That the Commission made a close guess on gas sales in its estimates for 1949-1950 (pp. 7-10).

Neither of these points have any bearing on the questions presented to this Court. It is true that respondent commission had discretionary authority to decline to reopen the rate case.

St. Joseph Stock Yards Co. v. *United States,* 298 U. S. 38, 80 L. Ed. 1033;

Interstate Commerce Commission v. *Jersey City,* 322 U. S. 503, 88 L. 5d. 1420;

Storrs v. *Pensacola & A. R. Co.,* 29 Fla. 617, 11 So. 226,

are sound authority for that proposition. But they are inappropriate to the case at bar.

The two Federal cases were cited by the city attorney in support of his objection to the taking of any new and additional testimony. They merely hold that it is a matter of sound discretion vested in an administrative board or agency whether or not, after it makes a rate order, to grant or deny a rehearing by re-opening the proceeding and hearing further testimony. In the *St. Joseph Stockyards Company* case, the Supreme Court affirmed the action of the Secretary of Agriculture in declining to give a *second* rehearing in the proceeding. (The Secretary had previously allowed *one* rehearing, 298 U. S., text p. 48). In the *Interstate Commerce Commission* case, the Supreme Court affirmed the Interstate Commerce Commission for denying a rehearing to the price administrator and the City of Jersey City. These two cases make it perfectly clear that the view of the U. S. Supreme Court in that hearings in administrative proceedings are not matters of right but are subject to the discretion of the administrative body.

In the case at bar, the Railroad Commission first entered its order No. 1571 on December 2, 1949. It made its order retroactive for the prior 11 months, that is to say, effective

from January 1, 1949 on. In making said order, the Commission made a number of estimates and forecasts concerning the Company's sales during the years 1949 and 1950, the Company's costs of fuels, the Company's taxes (other than Federal income taxes), the Company's rate-case expense, and the Company's depreciation, etc., etc. Just as soon as the Commission's order No. 1571, consisting of 34 pages of legal cap, could be examined and analyzed by us, we filed for the Company, with the Commission, a petition for adjustments and corrections to said order in order to correct the erroneous forecasts and estimates of the Commission in the light of actual experience of the Company for the calendar year 1949 to which the Commission's rates applied. On December 30, 1949, the Commission entered its order No. 1577 granting a further hearing and set the matter for hearing at Tallahassee on February 8, 1950, specifically ordering that jurisdiction of the subject-matter of the proceeding, and of the respective parties, be retained, and that its former order No. 1571 should not become final and effective until further order of the Commission. Moreover, on February 8, 1950, when the Commission reconvened, pursuant to its Order of December 30, 1949, the city attorney for the City of Jacksonville interposed an urgent objection "to reopening the record for the purpose of taking new and additional testimony" and argued and restated his motion repeatedly at pages 47-52 and 85-86 of the transcript of record.* The city attorney claimed that the case had "been closed," and urged that no further testimony be permitted, citing *St. Joseph Stockyards Company* v. *United States, supra,* and *Interstate Commerce Commission* v. *Jersey City, supra.* Before the Respondent Commission announced its ruling, Commission's counsel stated that he

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* Page references are to pages of the printed record.

would like for the record to show his position on the question (R. 53):

> "The Supreme Court of Florida, in the case of *Matthews* v. *State ex rel. St. Andrews Bay Transportation Company,* 111 Fla. 587, 149 So. 648, said that every promulgated order of an administrative tribunal, such as the Railroad Commission, may be superseded by another order. Likewise, the Commission has the power to modify, and, indeed, *it is its duty to modify,* its pre-existing orders, when new evidence is presented which warrants a change.
>
> "In view of this decision of our Supreme Court, it is the position of Commission's counsel that the Commission should deny the objection of the City and proceed to hear the testimony under this petition for whatever weight it may be entitled to when the Commission arrives at its final decision."

The Commission ruled that "the objection of counsel for the City will be overruled and the Commission will proceed with the case."

Thereupon, the Commission heard testimony on February 8th and 9th, 1950, in support of the Petition for adjustments and corrections. On March 29, 1950, the Commission adhered to its original Order of December 2, 1949, and declined to modify the same in the light of the actual experience of the Company for the calendar year 1949 and the month of January, 1950, even though the rates fixed by the Commission covered that identical period.

Thus, it is apparent that the Commission *actually exercised the discretion vested in it* and granted the Company a rehearing and actually heard the Company's witnesses on February 8 and 9, 1950.

If, instead of granting the Company's petition for a further rehearing by its Order of December 30, 1949, the Commission had, in the exercise of its discretion, *denied* the

Company a further rehearing, then the law cited by counsel for the Commission, at pages 5-6 of his brief, to the effect that the granting of rehearings by administrative boards is discretionary with the board, would be applicable, and the question before this court would be whether or not the Commission had abused its descretion by denying the Company a rehearing. See for example, *Atchison, Topeka & Santa Fe R. R. Co.* v. *U. S.*, 284 U. S. 248, 76 L. Ed. 273, where the U. S. Supreme Court held that the Interstate Commerce Commission had abused its discretion in denying a rehearing on the ground that new facts coming to light pending the proceedings should be taken into consideration before the Commission's order was made finally effective.

But no such question is here presented, and the cases cited by counsel for the Commission are irrelevant. Here we have an entirely different situation. Here the Commission, by its order No. 1577 dated December 30, 1949, exercised its discretion, set the proceeding for further hearing February 8, 1950, took testimony February 8 and 9, 1950, and, on March 29, 1950, utterly disregarded the uncontradicted proof made February 8 and 9, 1950.

It should be remembered that the Commission's order of December 2, 1949, was retroactive to January 1, 1949, and set rates for the Company for the years 1949 and 1950 (and thereafter until such rates might be changed). In this case at the time of the rehearing February 8 and 9, 1950, the Company proved without contradiction the facts constituting its actual experience for the entire calendar year 1949 and for the month of January, 1950. Thus the Commission had before it *actual facts* without contradiction, covering many of the matters involved in the Commission's estimates and forecasts contained in its order of December 2, 1949. These are detailed at page 10 of our original brief.

The question here is, therefore, not one whether or not the Commission had discretion to *grant* or *deny* the rehear-

ing (it exercised its discretion and granted the rehearing). The question here is whether or not the Commission, in making rates for the Company for the year 1949, might lawfully disregard the actual experience of the Company for that year, *proved before it without contradiction,* and in pursuance of its order *granting* a rehearing, and continue to adhere to its prior erroneous estimates and forecasts.

The answer to that question is set forth in our original brief pp. 8-14.

The court held in *Matthews* v. *State ex rel.,* 114 Fla. 587, 149 So. 648, that it is the "*duty*" of the Commission "to modify its pre-existing orders where new evidence is presented which warrants a change."

Moreover, in *West Ohio Gas Co.* v. *Public Utilities Commission,* 294 U. S. 80, 79 L. Ed. 773, the Supreme Court held that the action of the Public Utilities Commission of Ohio, in disregarding the actual experience of West Ohio Gas Co. shown on rehearing, and in persisting in adherence to its former erroneous estimate and forecast, was "an arbitrary judgment" and a violation of the due process clause of the 14th Amendment, against which courts afford relief.

The third case cited by a counsel for the Commission in his brief, page 7, is *Storrs* v. *Pensacola A. R. Co.,* 29 Fla. 617, 11 So. 226. This case is accurately analyzed and stated by counsel for the Railroad Commission, but it is irrelevant to the case before this Court. In the *Storrs* case, the Railroad Commission had fixed railroad rates. There was "a difference of intelligent opinion" between the Commission and the Railroad Company as to whether or not the rates would prove remunerative, the Supreme Court of Florida held that such a difference of opinion must be left to the test of experience.

That, however, is not the case before this Court. Here, before the final order of the Commission, March 29, 1950,

the rates fixed by the Commission for the year 1949 and the first month of 1950 were *actually put to the test of experience and found wanting.*

In the instant case, the petition for certiorari herein (pp. 2-3) demonstrates the mistakes in the Commission's estimates and forecasts of revenues and expenses and proves them to be wrong in numerous particulars. The Commission, with uncontroverted facts before it, declined to correct its errors established by uncontradicted proof. It is to be noted that the Commission's brief, in arguing this point, does not controvert the fact that the estimates and forecasts contained in its order of December 2, 1949, were conclusively proved to be in error February 8 and 9, 1950, and that, in its order of March 29, 1950, it disregarded the facts and adhered to its erroneous forecasts and estimates.

So it is clear that the law cited by the Commission in its brief, pp. 5-7, is irrelevant, and that the cases cited in our brief, pp. 11-14, establish that the Commission's order is arbitrary and in violation of the 14th Amendment to the Constitution of the United States.

Respondent does not question the errors and mistakes in its estimates and forecasts of revenues and expenses. Respondent is content to attempt to justify one estimate, that of gas sales for the year 1949, by showing that its error was only 4.34 percent.

Not only does the Commission fail to justify any of its other erroneous estimates, but its argument wholly fails to meet the proposition that, before it made its order final on March 29, 1950, it had before it uncontradicted evidence of the Company's gas sales for the year 1949 and for the month of January, 1950, and that, with uncontradicted evidence placed before it February 8 and 9, 1950, it still ignored the facts, at a time when it was possible for

it to correct same, and when it was its legal duty to correct same, and it continued to adhere to its erroneous estimates, *not only of gas sales, but also of various underestimates of expenses.*

And so we say that the Commission's order of March 29, 1950 was arbitrary in disregarding uncontradicted facts duly proved at the hearings, February 8 and 9, 1950, which it specifically ordered to be held by its order of December 30, 1949, and has violated the due process clause of the Constitution of the United States.

> ***West Ohio Gas Company*** **v.** ***Public Utilities Commission*****, supra.**

We agree with respondent that there should be a time when a proceeding to fix rates for a public utility must come to an end. However, the conclusion of rate proceedings is not the primary result to be attained. The primary result to be attained is to fix a reasonable rate determined from the proven facts.

Respondent found and determined that petitioner is entitled to earn 7% (R. 31) on its depreciated investment of $2,973,903.60 (R. 30), or $208,173.25 (R. 25).

At the same time respondent prescribed retroactive rates which, because of errors in estimates and forecasts of revenues and expenses, would have provided a return for the year 1949 of $42,077.72 less than the $208,173.25 which the Respondent Commission found to be a reasonable earning (R. 68)!

Furthermore, petitioner's earnings for 1949 closely approximate the earnings found by the Respondent Commission to be reasonable, $12,618.23 (R. 111) or approximately .94% greater than the revenue necessary to give petitioner a fair return on its original dollar cost.

Conclusion

Petitioner respectfully submits that writ of certiorari should be granted herein; and that in the interest of an early, fair and just conclusion of this rate proceedings, this cause should be remanded to the Utilities Commission with directions that petitioner's actual experience for the years 1949 and 1950 must be considered and taken into account in fixing definitive rates to be charged for gas.

Respectfully submitted,

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